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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982
No. _____

COUNTY OF VENTURA,

Petitioner,

v.

JOYCE TILLETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Before an unrepresented indigent defendant who has already been served with a summons and complaint in a suit filed by a county for child support alone, when paternity is not at issue, can enter into a stipulated judgment to pay child support, does the Fourteenth Amendment first require the holding of a prejudgment judicial hearing at which such defendant

must waive the right to notice and the right to a hearing on the merits?

2. Does the Fourteenth Amendment require the appointment of counsel for indigent defendants in civil suits for child support alone when paternity is not at issue and when a county either appears as the plaintiff or represents the interests of the child?

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INTRODUCTION

Petitioner, County of Ventura, respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari, by which Petitioner seeks review of the judgment of the Court of Appeal of the State of California, filed June 28, 1982, reversing the judgment of the trial court, and on which hearing was denied by the Supreme Court of the State of California on September 22, 1982.

OPINIONS BELOW

On May 17, 1982, Division Four of the Court of Appeal of the State of California, Second Appellate District rendered an opinion reversing the judgment for child support entered by the Superior Court of the State of California for Ventura County, the trial court. The initial opinion was reported in the Official California Advance Sheets at 132 Cal.App.3d 767.

Petitioner County of Ventura sought a rehearing which was granted. The opinion of May 17 was vacated. A copy of the order granting rehearing is attached at Appendix A.

Thereafter on June 28, 1982, the Court of Appeal rendered a new opinion again reversing the judgment of the Superior Court. A copy of this opinion appears at Appendix B and is reported at 133 Cal.App. 3d 105, 183 Cal.Rptr. 741 (1982).

Thereafter petitioner County of Ventura filed a petition for hearing in the Supreme Court of the State of California. The petition for hearing was denied on September 22, 1982. A copy of the order denying hearing appears at Appendix C of this Petition for Writ of certiorari.

JURISDICTION

The final decision of the Court of Appeal of the State of California was filed on June 28, 1982. Thereafter petitioner County of Ventura filed a timely petition for hearing in the Supreme Court of the State of California, within the meaning of 28 U.S. Code section 2201(d), which petition was denied on September 22, 1982. A copy of the order denying hearing is attached as Appendix C.

Petitioner invokes the jurisdiction of this Court to review this decision under

28 U.S. Code section 1257(3) since the right to appointed counsel in a civil suit for child support where paternity is not at issue and the right to a prejudgment judicial hearing to determine waiver of notice and of the opportunity to be heard before a stipulated judgment can be entered against an indigent defendant in a suit for child support brought by a county as a plaintiff or on behalf of a minor child, have been claimed under the United States Constitution by respondent Joyce Tillett.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, section 2, in relevant part:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under this Authority. . . ."

United States Constitution, Amendment XIV, in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

". . ."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, section 654 in relevant part:

"A State plan for child . . . support must -

". . . .

"(4) provide that such state will undertake -

"(B) in the case of any child with respect to whom such assignment is effective, to secure support for such child from his parent. . . .

"(6) provide that (A) the child support collection or paternity determination services established

under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State. . . ."

California Welfare and Institutions Code section 11350 in relevant part:

"In any case of separation or desertion of a parent or parents from a child or children which results in aid under this chapter being granted to such family, the noncustodial parent or parents shall be obligated to the county for an amount equal to:

"(a) The amount specified in an order for the support and maintenance of such family issued by a court of competent jurisdiction; or in the absence of such court order;

"(b) The amount of aid paid to the family during such period of separation or desertion limited by such parent's reasonable ability to pay during that period in which aid was granted; and

"(c) Such obligation shall be reduced by any amount actually paid by

such parent during such period of separation or desertion for the support and maintenance of such family.

"The district attorney shall take appropriate action pursuant to this section in the superior court of the county which provided aid under this chapter. . . ."

California Welfare and Institutions Code section 11350.1 in relevant part:

"Notwithstanding the provisions of any other statute, in any action brought by the district attorney for the support of a minor child or children, the action may be prosecuted in the name of the county on behalf of such minor child or children. The mother shall not be a necessary party in such action but may be subpoenaed as a witness. . . ."

California Welfare and Institutions Code section 11475.1 in relevant part:

"Each county shall maintain a single organizational unit located in the office of the district attorney which shall have responsibility for

promptly and effectively enforcing the obligation of parents to support their children and determining paternity in the case of a child born out of wedlock. The district attorney shall take appropriate action, both civil and criminal, to enforce this obligation when the child is receiving public assistance and when requested to do so by the individual on whose behalf the enforcement efforts will be made when the child is not receiving public assistance . . . ."

STATEMENT OF THE CASE

The plaintiff in the underlying California Superior Court suit was the County of Ventura, acting on behalf of two minor children of respondent Joyce Tillett. These two children were not in respondent Tillett's custody, and the County had provided them welfare benefits. Paternity, or in this case "maternity," was never and is not now an issue in this case.

On December 4, 1978, a civil suit was commenced against defendant-respondent Tillett in Ventura County Superior Court

under California Welfare and Institutions Code sections 11350 and 11350.1. The complaint sought ongoing monthly child support for the children in the amount of $120.00 per child per month for a total of $240.00 per month, plus reimbursement for welfare funds previously provided the children.

Respondent was served with a copy of the complaint and the summons. The summons was on a form approved by the California Judicial Conference which contained in bold faced type the statement:

> "NOTICE! You have been sued. The court may decide against you without being heard unless you respond within 30 days. Read the information below."

The summons then gave directions for filing an answer, repeated the time limit for answering, advised her that a default judgment could be entered if she did not answer and stated, again in bold faced type, that if she wished to seek the advice of an attorney she should do so promptly so that any written response would be filed on time (A copy of the summons is attached to this Petition for Writ of Certiorari as Appendix D).

The record does not show that appellant contacted an attorney. Instead, after having been served with a copy of the summons and complaint, respondent contacted the District Attorney's office in Ventura County where she worked out a stipulated judgment. The judgment, filed on January 26, 1979, required that respondent pay monthly child support in the amount of $50.00 per child per month and that she reimburse the county for welfare previously provided the children in the amount of $1,148.00 at the rate of $5.00 per month. At this time appellant had just received her license to sell insurance.

Approximately seven months later, on August 27, 1979, respondent was cited with civil contempt for wilfully failing to make her child support payments. After waiving her right to counsel, on October 12, 1979, she pleaded guilty to four counts of contempt and was placed on probation.

On August 6, 1980, approximately one year after the filing of the order to show cause in the contempt proceeding, petitioner sought to revoke respondent's

probation, the hearing on the revocation was continued to October 30, 1980. On October 30 and 31, 1980, respondent, through counsel, filed motions to vacate the judgment of January 26, 1979, based upon the theory that she had not been represented by an attorney when she stipulated to the judgment and had not waived her right to such representation, and further, based upon a claim of extrinsic fraud. When her motions were denied, respondent appealed to the California Court of Appeal.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari in this case should be granted. The Fourteenth Amendment does not mandate a prejudgment hearing before a stipulated judgment can be entered in child support cases, and the California Court of Appeal erred in finding such a requirement.

This stipulated judgment in this case met all the requirements for due process and was the result of an arm's length transaction.

However, if in fact a stipulation for a judgment entered into after service of a summons and complaint could be considered some form of confession of judgment, then, under D.H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174, such a stipulation is not per se unconstitutional. Furthermore, under Overmyer, despite some lower court authority to the contrary, no prejudgment hearing as to the validity of the waiver of the right to notice and hearing is constitutionally required before judgment can be entered.

On the other hand, if it is assumed that confessions of judgment do require prejudgment hearings, stipulations for judgment entered into by defendant non-custodial parents after service of a summons and complaint, are distinguishable from confessions of judgment of the sort entered into by consumers in an installment sales contract before any legal controversy has arisen. In the case of the stipulated

judgment, the defendant has already received notice of the pending legal action and of the opportunity to appear to contest the issue on the merits. Indeed the stipulated judgment is closer to a settlement and release than to a cognovit.

For all these reasons the California Court of Appeal erred in holding that a prejudgment hearing was required with respect to the stipulation involved in this case.

Nor does the Fourteenth Amendment require appointment of counsel when only child support is at issue in a purely civil proceeding. The only interests involved pertain to money, there is little risk of erroneous results since the issues involved are simple, and finally, deprivation of liberty does not result from a judgment for the plaintiff.

It is extremely important that this Court grant the petition for writ of certiorari in this case. If allowed to stand, the holding of the California Court of Appeal will benefit neither society in general nor children in particular. If certiorari is not granted, thousands

of child support judgments will be treated as constitutionally void and thousands of children will then be left without support from their parents.

ARGUMENT

IN CIVIL SUITS FILED BY A COUNTY FOR CHILD SUPPORT ALONE AND NOT TO DETERMINE PATERNITY, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES NEITHER THE APPOINTMENT OF COUNSEL, NOR A PREJUDGMENT HEARING ON THE ISSUE OF THE WAIVER OF THE RIGHT TO NOTICE AND HEARING, BEFORE A STIPULATED JUDGMENT RESOLVING THE CASE CAN BE ENTERED

In its opinion reversing the order of the California Superior Court, the California Court of Appeal held that child support judgments carry with them a threat of incarceration.[1/] Therefore the court concluded if a defendant in a suit for

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1. The question whether imprisonment can be considered the result of a child support proceeding is considered in part B(2) of the Argument, infra, p. 55.

child support alone has not had the assistance of counsel[2] in agreeing to a stipulated judgment with the state, there must be a judicial determination of the issue of the waiver of the due process right[3] to notice and a hearing before

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2. The question whether appointed counsel is constitutionally mandated is dealt with in Part B of the Argument infra, page 44.

3. The California Court of Appeal's decision in this case was based solely on federal grounds. The court relied upon the cases of Isbell v. County of Sonoma (1978) 21 Cal.3d 61, 577 P.2d 188, 145 Cal.Rptr. 368, cert. denied as petition was untimely filed (1978) 439 U.S. 996; County of Ventura v. Castro (1979) 93 Cal.App.3d 462, 156 Cal.Rptr. 66, cert. denied (1980) 494 U.S. 1098; D.H. Overmyer Co. v. Frick Co., supra (1972) 405 U.S. 174; Boddie v. Connecticut (1971) 401 U.S. 371, 28 L.Ed 2d 113, 91 S.Ct. 780; Payne v. Superior Court (1976) 17 Cal.3d 908, 914, 132 Cal.Rptr. 405, 553 P.2d 565; County of Los Angeles (Holley) v. Superior

judgment can be entered. In the absence of such a prejudgment hearing, the child

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Court (1980) 102 Cal.App.3d 926, 162 Cal. Rptr. 636; and Salas v. Cortez (1979) 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P.2d 226, cert. denied (1979) 444 U.S. 900. (Opn. of Ct. of App., App. B, pp. 76, 77, 78, 80-83.)

In Castro at pp. 468-470, the California Court of Appeal referred to D.H. Overmyer Co. v. Frick Co., supra, (1972) 405 U.S. 174, and Johnson v. Zerbst (1938) 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019, but based its decision upon Isbell v. County of Sonoma, supra (1978) 21 Cal.3d 61. Isbell held a California statute governing certain confessions of judgment to be unconstitutional as a denial of due process. (p. 39.) Isbell was decided solely upon federal constitutional grounds. (See Isbell v. County of Sonoma, supra, 21 Cal.3d 61, 65, 75, 577 P.2d 188, 190, 196, 145 Cal.Rptr. 368, 370, 376.)

County of Los Angeles (Holley) was based upon Salas v. Cortez, supra. In

support judgment is void as unconstitutional. (Cal. Ct. of App. Opn., App. B, pp. 82-83.)

Salas at pages 26-27, the California Supreme Court noted that the Fourteenth Amendment to the United States Constitution as well article I, section 7, subdivision (a) of the California Constitution require that individuals receive due process of law. However, if at issue at all, the "state constitutional holding depended upon the state court's view of the reach of the . . . Fourteenth Amendment." (Delaware v. Prouse (1979) 440 U.S. 648, 653, 59 L.Ed.2d 660, 99 S.Ct. 1391.) In its opinion in Salas the court relied on either United States Supreme Court cases (e.g., Boddie v. Connecticut, supra (1971) 401 U.S. 371; In re Gault (1967) 387 U.S.1, 18 L.Ed.2d 527, 87 S.Ct. 1428; Specht v. Patterson (1967) 386 U.S.605, 18 L.Ed.2d 326, 87 S.Ct. 1209) or California cases which themselves relied on United States Supreme Court cases, (e.g., Payne v. Superior Court, supra (1976) 17 Cal.3d 890, relying

It is respectfully submitted that the California Court of Appeal erred in reaching this holding, for respondent was deprived of no constitutional right and the judgment of the California Superior Court, the trial court, was correct.

Moreover, if this Court does not hear this case on the merits, substantial harm will result. Thousands of existing child support judgments will be found to be constitutionally void (not voidable), and thousands of children will suddenly be left without support from their parents.

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inter alia on Boddie v. Connecticut, supra; In re Love (1974) 11 Cal.3d 179, 113 Cal.Rptr. 89, 520 P.2d 713, relying on Gagnon v. Scarpelli (1973) 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756.)

A. Stipulated Judgments for Child Support Meet Constitutional Requirements for Due Process

1. If District Attorney -- Noncustodial Parent Stipulated Judgments are Indeed a Form of Confession of Judgment, The Decision Below Conflicts with the Decision of This Court Which Holds that Confessions of Judgment are Not per se Unconstitutional.

In concluding that stipulated judgments were a form of confession of judgment and in finding the stipulated judgment in this case unconstitutional as a denial of due process, the California Court of Appeal based its decision upon Isbell v. County of Sonoma, supra, (1978) 21 Cal.3d 61, cert. denied as petition was untimely filed (1978) 439 U.S. 996; County of Ventura v. Castro, supra (1979) 93 Cal.App.3d 462, 469, cert. denied (1980) 444 U.S. 1098; and D.H. Overmyer Co. v. Frick Co., supra (1972) 405 U.S. 184, 188. (Opn. of Ct. of App., Exh. B, pp. 76-79, 82-83.)

Isbell held that the California confession of judgment statute denied debtors due process under the Fourteenth Amendment because the statute did not permit prejudgment judicial determinations as to the validity of debtors' waivers. The Isbell court noted that the availability of post judgment relief did not cure the unconstitutionality of the statute. In reaching its decision, the Isbell court concluded that D.H. Overmyer Co. v. Frick Co., supra (1972) 405 U.S. 174, was not in point. It reasoned that Overmyer did not hold that a confession of judgment procedure, which required the entry of judgment without a prior showing of waiver, complied with due process requirements. (Isbell v. County of Sonoma, supra, 21 Cal.3d 61 71-72.)

The California Supreme Court clearly erred in Isbell in not recognizing that this Court's holding in D.H. Overmyer Co. v. Frick Co., supra, 405 U.S. 174, was controlling. In Overmyer, this Court upheld the validity of a judgment entered on a cognovit containing a warrant of attorney stating: "Our holding necessarily

means that a cognovit clause is not, per se, violative of Fourteenth Amendment due process." (405 U.S. at p. 188.)

In Castro, the California Court of Appeal relied on Isbell in striking down as unconstitutional per se a state statute allowing district attorneys and individuals to agree to the entry of a Judgment of Paternity and/or child support without the district attorney's first filing and serving a civil complaint. In his dissenting opinion from the denial of certiorari in County of Ventura v. Castro, supra, 444 U.S. 1098, 1101, joined by Justice Rehnquist, Justice Blackmun stated that he believed that Castro presented a substantial question as to whether the California Court of Appeal's decision in Castro was consistent with Overmyer. He stated that he would grant the petition and set the case for argument because the issue was bound to recur.

As Justice Blackmun predicted, the issue has recurred, in fact, from the same California Court of Appeal which wrongly decided Castro. The decision in the instant case was also reached in clear

violation of this Court's conclusion in Overmyer that confessions of judgment are not unconstitutional per se but must be analyzed on a case by case basis.

Like the California Supreme Court in Isbell and the California Court of Appeal in Castro, the California Court of Appeal also failed to follow Overmyer in this case.

Petitioner does not dispute that it is possible for individual agreements to be invalid on their own facts, but possible deficiencies in individual cases should not serve to invalidate thousands of stipulated judgments entered into over a period of years. Certiorari should be granted here; otherwise thousands of children will be left without support.

2. There Is a Conflict Among the Lower Courts on the Proper Application of Overmyer v. Frick as to the Necessity of a Prejudgment Hearing for Confessions of Judgment

The California Court of Appeal held that respondent's right to due process was violated because there was no hearing

prior to entry of judgment[4/] (Opn. of Ct. of App., App. B, pp. 82-83.) In Overmyer v. Frick, supra, 405 U.S. 174, this Court held that confessions of judgment are not unconstitutional per se and that a debtor may validly waive the right to notice and hearing and to present a defense on a note. In both Overmyer and its companion case, Swarb v. Lennox (1972) 405 U.S. 191,

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4. Under California Code of Civil Procedure section 473, the court which has rendered a judgment may, upon such terms as may be just, set aside the judgment taken against a party by mistake, inadvertence, surprise, or excusable neglect, provided that the application is accompanied by a copy of the proposed answer and that the application is made within a reasonable time, but not more than six months after the judgment was taken. Since January 1, 1982, the moving party has not been required to file an affidavit or declaration as to the existence of a meritorious defense. (See In re Marriage of Carter, 19 Cal.App.3d 479, 489. 79 Cal.Rptr. 274, 279.)

the Court considered and upheld confession of judgment statutes which did not provide for a prejudgment hearing on the validity of the waiver. Despite the fact that these cases did not require a prejudgment hearing, lower courts are nevertheless divided as to whether such a hearing is required.

The clash between the lower courts is evident in the decision of the three judge federal district court in Tunheim v. Bowman (D. Nev. 1973) 366 F. Supp. 1392. Tunheim involved a challenge to the constitutionality of Nevada's confession of judgment statutes. There plaintiffs alleged that the failure of the statute to provide for notice and hearing prior to judgment rendered them unconstitutional. The court dissolved the three judge panel, holding that prior controlling decisions rendered insubstantial any claim that the Nevada statutes were unconstitutional. The court stated:

> "The allegation that the Nevada confession of judgment statutes are on their face unconstitutional because they do not incorporate a requirement

> of prior notice and hearing before judgment is entered falls before the decision of the Supreme Court in D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124. . . . The Overmeyer case specifically holds that statutes legalizing cognovit clauses without a requirement of prior notice and hearing are not per se unconstitutional under the due process clause of the Fourteenth Amendment." (366 F.Supp. at 1393-1394.)

The Tunheim court went on to reject the interpretation of Overmyer made by a federal district court in Delaware in a series of opinions beginning with Osmond v. Spence (D.Del. 1971) 327 F.Supp. 1349. In Osmond, a three-judge federal court had held that Delaware's confession of judgment statutes were unconstitutional because they did not provide prejudgment notice and hearing. On appeal, this Court ordered the case remanded in light of Swarb and Overmyer. (405 U.S. 971 (1972).) On remand, the trial court maintained its original opinion that

notice and hearing were required prior to entry of judgment. ((D.Del. 1972) 350 F.Supp. 124.)[5/]

The Tunheim court disagreed with this interpretation of Overmyer:

> "The Overmyer case did not leave the question open. It specifically held that a statutory scheme which does not provide for notice and hearing prior to entry of a confessed judgment did not run afoul of due process requirements." (366 F.Supp. at 1394.)

The Maryland Court of Appeals holds a view similar to that expressed in Tunheim:

> "In any event, Overmyer cannot be read to mandate a 'waiver hearing' prior to entry of a confessed judgment and, insofar as one may be required thereafter, it was clearly available to appellants at the hearing on their motion to vacate. No more is required." (Billingsley v. Lincoln National Bank (1974) 271 Md. 683, 693, 320 A.2d 34, 39.)

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5. No further appeal was taken.

In accord with Tunheim and Billingsley are the decisions in Irmco Hotels Corp. v. Solomon (1975) 27 Ill.App.3d 225, 326 N.E.2d 542, 544; State Finance Corp. v. McGee (1975) 27 Ill.App.3d 421, 326 N.E.2d 518, 521; Copeland Planned Futures, Inc. v. Obenchain (1973) 9 Wash.App.32, 510 P.2d 654, 657; and Buckner v. Carmack (La.Sup.Ct. 1973) 272 So.2d 326, 331, app. dismissed (1974) 417 U.S. 901. (See also Colonial Bank & Trust Co. v. Cahill (N.D. Ill. 1976) 424 F. Supp. 1200; Chittester v. LC-DC-F Employees of G.E. Federal Credit Union (W.D. Pa. 1974) 384 F. Supp. 475, 479.)

In contrast, Virgin Islands National Bank v. Tropical Ventures, Inc. (D.V.I. 1973) 358 F. Supp.1203, 1206-1208 (District Court ordered evidentiary hearing before it would approve confession of judgment) and Scott v. Danaher (N.D. Ill. 1972) 343 F. Supp. 1272, 1277-1278 (decided prior to Overmyer) are in accord

with Osmond v. Spence, supra.[6/]

The conflicting interpretations of Overmyer made by the lower courts as to the necessity of a prejudgment hearing points out the importance in resolving the constitutional requirements of due process within the context of this case. Accordingly a writ of certiorari should issue to resolve this conflict.

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6. In addition to the conflict with respect to the necessity of a prejudgment hearing, lower courts also disagree as to the proper allocation of the burden of proof in a proceeding challenging the debtor's waiver. (Cf. Osmond v. Spence, supra, at p. 127 with Virgin Islands National Bank v. Tropical Ventures, Inc., supra, at p. 1207 and Irmco Hotels Corp. v. Solomon, supra.) In the instant case the California Court of Appeal did not consider the question of burden of proof.

3. Even Assuming that Confessions of Judgment Require a Prejudgment Hearing to Insure that Defendants are Given Notice of the Proceedings and of Their Right to be Heard, Stipulations for Entry of Judgment Made after Service of Process are Distinguishable from Traditional Confessions of Judgment Because the Defendant Who has been Served has Received Notice of the Proceeding and of the Right to a Hearing

In Mullane v. Central Hanover Bank & Trust Co. (1950) 339U.S. 306, 313, 94 L.Ed. 865, 872-873, 70 S.Ct. 652, 656-657, cited in Isbell at page 68, the court stated that due process requires "notice and opportunity for hearing appropriate to the nature of the case."[7] (See also

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7. At one point in Isbell the court appears to indicate that a hearing is always required (Isbell v. County of Sonoma, supra, at p. 68), as opposed to an opportunity for a hearing. However, if an actual hearing were required for due process, all default judgments would be

Boddie v. Connecticut, supra (1971) 401 U.S. 371, 377, 378.) "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." (Mullane v. Central Hanover Tr. Co., supra, 339 U.S. 306, 313.) "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (Id., at p. 314.) Here the record clearly establishes that respondent was served with a summons and complaint. At the time of service in this case, the prescribed form of summons as revised January 1, 1977, advised the defendant that if he or she desired to seek the advice of an attorney he or she should do so promptly so that the written response, if any, might be filed on time. (See App. D, a copy of the summons served on respondent and proof of service.) Since respondent

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unconstitutional. (See Boddie v. Connecticut, supra (1971) 401 U.S. 381, 378.)

has had proper notice and the opportunity to appear as required by the Fourteenth Amendment, the issue of waiver of notice and opportunity to appear is not relevant. Accordingly this case is distinguishable from Isbell and Castro, and from those cases cited above which mandate a hearing, all of which dealt with the question of waiver.[8/]

A second means of distinguishing this case from the cases requiring a prejudgment hearing is that this case involved a stipulated judgment and not a cognovit. As one commentator has noted:

> "Today, two types of confessed judgments are recognized; the cognovit actionem and the cognovit note. The first is the debtor's

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8. It is an anomaly that respondent claims her due process rights were violated when she voluntarily stipulated to the judgment in this case, for if she had never contacted the District Attorney and if a default judgment had been entered instead, no one could assert that her rights had been violated.

written confession of liability, usually prepared after service of process. The written acknowledgment is then admissible in a judicial proceeding, where judgment is entered. Since notice of the action and the opportunity to litigate are the fundamentals of procedural due process, such a procedure raises no significant due process problems. This method of confessing judgment without action avoids needless litigation.

"The harshness of confessed judgments arises under the second form, the cognovit note, which is the subject of recent litigation. This type of note, incorporated in a contract or other document, attempts in advance of any legal controversy to authorize (1) the assumption of in personam jurisdiction over the debtor in case of default and (2) the entering of judgment without notice and hearing for the amount confessed. The cognovit note usually consists of three provisions: a consent to

jurisdiction, a waiver of notice and hearing, and a warrant of attorney authorizing judgment. Upon the slightest default, the creditor, without notifying the debtor that legal action has been initiated, can have an attorney confess judgment for the debtor in the amount due. [Fns. omitted; emphasis in original.]" (Note, "Cognovit Revisited; Due Process and Confession of Judgment," (24 Hast. L.J. (1973) at pp. 1045-1046).

However the case at bar involves a stipulated or consent judgment which is akin to a settlement or release. It is certainly not a cognovit note. Here after service of process, both parties came together and worked out an agreement satisfactory to both. The judgment was by stipulation or consent and was clearly valid. (Cf. Utah v. United States (1969) 394 U.S. 89, 93 (Parties may limit the issues tendered to a court for decision by stipulation).)

Petitioner respectfully submits that the holding of the California Court of

Appeal distinguishing due process requirements in contested and uncontested cases (Opn. of Ct. of App., App. B, p. 76) and equating cognovit notes with by stipulations entered into after service of process (Opn. of Ct. of App., App. B, pp. 78-79) is without authority and is clearly erroneous. Here respondent received constitutionally proper notice, had the opportunity to be heard in the same manner as any other civil litigant, and thereafter agreed to a compromise. There was no constitutional error.

Accordingly, the petition for writ of certiorari should be granted.

B. The Due Process Clause of the Fourteenth Amendment Does not Require Appointment of Counsel for Indigents in Civil Suits for Child Support Alone

When a county sues to obtain child support alone under California Welfare and Institutions Code sections 11350 and 11350.1 as in the instant case, the county is not seeking to establish a child support obligation or a parent-child relationship. Parenthood is not at issue,

and the obligation to support already exists as a matter of law under California Civil Code sections 196 and 196a because of the preexisting parent-child relationship.

Although cases in other jurisdictions have held that counsel is required in paternity suits,[9/] the rationale for such holdings does not support a requirement under the Fourteenth Amendment for court-appointed counsel in civil suits where the only question at issue is child support and paternity is not being litigated. (See Artibee v. Cheboygan Circuit Judge (1976) 397 Mich. 54, 243 NW2d 248; Reynolds v. Kimmons (Sup.Ct. Alaska) 599 P.2d 799; Salas v. Cortez, supra, 24 Cal.3d 22.)

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9. Respondent does not concede that the Fourteenth Amendment requires appointed counsel in paternity actions; however that issue is not before the Court in this case. (See, e.g., Dept. of Health and Rehab. Serv. v. Heffler (Fla. Sup.Ct. 1980) 382 So.2d 301; Hamilton v. Snodgrass (Iowa Sup.Ct. 1982) ___N.W.2d ___, 9 Fam L.Rptr. 2065.)

Indeed, based upon an analysis of the private interests involved in a suit for child support alone, the governmental interests involved, the risk that the procedures will lead to erroneous results, the probable value of the procedure requested by the private party, and the presumption against appointing counsel except where deprivation of liberty is really at issue (see Lassiter v. Department of Social Services (1981) 452 U.S. 18, 27, 68 L.Ed.2d 640, 649, 101 S.Ct. 2153, 2159; Little v. Streater (1981) 452 U.S. 1, 13, 68 L.Ed.2d 627, 636, 101 S.Ct. 2202, 2209), it is clear that appointed counsel in the circumstances of this the case is not constitutionally compelled.[10] It is

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10. The absolute due process requirement in criminal cases is that no person be imprisoned for an offense unless he is represented by counsel at trial. (Scott v. Illinois (1979) 440 U.S. 367, 373, 59 L.Ed.2d 383, 389, 99 S.Ct. 1158, 1162; Argersinger v. Hamlin (1972) 407 U.S. 25, 37, 32 L.Ed.2d 530, 538, 92 S.Ct. 2006,

further urged that this Court consider this issue on the merits in order to finally resolve the question.

2012.) It also requires the appointment of appellate counsel for indigents in criminal proceedings where an appeal is a matter of right. (Douglas v. California (1963) 372 U.S. 353, 356-358, 9 L.Ed 2d 811, 814-815, 83 S.Ct. 814, 816-817.) Unlike the absolute right to counsel mandated by specific provisions of both federal and state constitutions for individuals accused of criminal offenses, the right to counsel in other than criminal proceedings is conditioned and determined on a case by case basis. (Cf. Gagnon v. Scarpelli, supra, (1973) 411 U.S. 778, 790.) Clearly however, the nature of civil suits for child support is distinguishable from the limited situations in which appointment of counsel has been required in other than criminal proceedings.

Failure to grant certiorari in this case will mean that thousands of existing child support judgments will be ruled unconstitutional as void. Thousands of children will then be left without support.[11]

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11. Petitioner stresses that the issue is not whether the presence of counsel might be helpful or even whether a state legislature could by statute provide for appointing counsel. The question is whether the appointment of counsel is mandated be the Fourteenth Amendment. An additional consequence of holding that counsel is mandated in a whole new class of cases is that counsel will in fairness press for a statute allowing them to be compensated. Given this time of limits on governmental resources, this means that the Legislature will be forced to appropriate money for counsel fees rather than for education or health services or other vital social programs.

1. No Fundamental Interests Are at Stake

In Little v. Streater, supra (1981) 452 U.S. 1, 16, footnote 2, this Court held that the interests of the child and the indigent defendant in paternity actions are constitutionally significant as opposed to those of an indigent seeking discharge in bankruptcy or seeking appellate review of an agency determination resulting in reduced welfare benefits. (Cf. Salas v. Cortez, supra, 24 Cal.3d 22, 28 (freedom from an incorrect imposition of the parent-child relationship is a compelling interest); see United States v. Kras (1973) 409 U.S. 434, 34 L.Ed.2d 626, 93 S.Ct. 631; Ortwein v. Schwab (1973) 410 U.S. 656, 35 L.Ed.2d 572, 93 S.Ct. 1172.)

However unlike the situation in Little v. Streater, supra, or in Salas v. Cortez, supra, no fundamental personal or family relationships are involved here.

The establishing of a certain dollar amount as due for child support neither profoundly affects the defendant's life, nor affects reputations, nor disrupts any

established family relationship (cf. Salas v. Cortez, supra, 24 Cal.3d 22, 28-29; dissenting opinion of Justice Blackmun in Lassiter v. Department of Social Services, supra, 452 U.S. at p. 35; and dissenting opinion of Justice Stevens, at p. 59; Cal. Civ. Code, § 4382; Cal. Code Civ. Proc., § 1694). Such a judgment does not establish a new support obligation but instead simply tells the parent how much he or she must pay and serves to enforce the duty to support the law already imposed by virtue of parenthood alone under California Civil Code sections 196 and 196a. (See Lyons v. Mun. Ct., 75 Cal.App.3d 829, 840-841, 142 Cal.Rptr. 449, 453-454.) Moreover, unlike a civil judgment in a breach of contract case, a judgment for future child support in California can be modified downward a year, a month, or even a day after the original judgment was entered if the defendant's financial circumstances have become worse during the interim. (Cal. Civ. Code, § 4700.)

Indeed, respondent's interests are not qualitatively different from those of any

other civil litigant against whom a money judgment is sought. The due process rights of criminal defendants should not be extended to ordinary civil litigants who, like respondent, have but a monetary interest in the outcome of the litigation.

2. There Is No Likelihood of Erroneous Results if Judgment is for the Plaintiff

Another concern of the Court of Appeal was the asserted disparity of bargaining power between indigent defendants and the state and thus the likelihood of erroneous results. (Opn. of Ct. of App., App. B., pp. 80-82; see also Salas v. Cortez, supra, 24 Cal.3d 22, 31.) Even assuming that there is in fact "disparity" in paternity cases, the crux of the disparity in the paternity context arises from the complexity of litigating the question of paternity, for paternity actions can involve such arcane matters as discovery and scientific blood grouping tests, and counsel for the plaintiff can be a specialist in handling paternity

actions.[12/] (See Salas v. Cortez, supra, at pp. 31-32.) However, such a situation

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12. The "disparity" cannot arise from the mere fact that a governmental entity is a party to the proceeding or is representing the interests of a person involved in the proceeding (here the minor child or children) and a private party is on the other side. If such were the case, attorneys would be constitutionally required in each and every case where a private citizen is on one side of a case and a government attorney is on the other side, such as all traffic infractions, all licensing actions, all condemnation proceedings, all actions to abate a nuisance filed by a governmental entity, all consumer actions filed by a governmental entity, all environmental actions filed by a governmental entity and all tort and contract actions in which a governmental entity is either a plaintiff or a defendant. Apointed counsel could also be required when a large corporation such as General Motors or State Farm

does not exist in suits to obtain child support, for even where, as here, there is no preexisting child support order, the issues presented in a suit under California Welfare and Institutions Code sections 11350 and 11350.1 are very simple. These are: (1) Is the person who is actually served the non-custodial parent defendant named in the complaint? (2) If so, what are the non-custodial parent's assets and income and expenses, what is the non-custodial parent's current ability to earn, and what is the amount necessary for the support, maintenance, and education of the child? (See Cal. Civ. Code, §§ 196a, 4700; In re Marriage of Utigard, 126 Cal.App.3d 133, 143, 178 Cal.Rptr. 546, 551.)

Moreover, any actual trial proceeding is not complex since the matter is heard as a suit in equity and there is no right to a trial by jury. (Van Buskirk v. Todd, 269 Cal.App.2d 680, 685-686, 75 Cal.Rptr.

Insurance is suing an individual citizen if mere size or economic power of a party were the determining factor.

280, 283; Kyne v. Kyne, 38 Cal.App.2d 122, 133, 100 P.2d 806, 812; 4 Markey, Cal.Fam.Law (1982), § 62.41[1]; see also Reynolds v. Reynolds, 86 Cal.App.3d 732, 734-735, 150 Cal.Rptr. 423, 425 (No right to jury trial in suit for child support under the Revised Uniform Reciprocal Enforcement of Support Act, Code Civ. Proc., § 1650 et seq., since the fixing of support is equitable in nature.) Thus, because the issues and the proceedings are simple, disparity is not an issue, and an appointed attorney is not necessary to avoid erroneous results.[13]

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13. In few lawsuits are the sides ever truly equally matched. "[T]he fact that a particular service might be of benefit to [a] defendant does not mean that the service is constitutionally required." (Ross v. Moffitt (1974) 417 U.S. 600, 616, 41 L.Ed.2d 341, 354, 94 S.Ct. 2437, 2446-2447.) California has no duty to "duplicate the legal arsenal that may be privately retained" by a defendant. It must only "assure the indigent defendant an adequate opportunity to

3. The Defendant's Liberty Is Not at Stake

The California Court of Appeal was concerned with the question of the possibility of incarceration. (Opn. Ct. of App., App. B, pp. 80-82.) However, under California Civil Code sections 196 and 196a, a parent who has never been sued under California Welfare and Institutions Code section 11350 is still obligated to provide support by virtue of parenthood alone. Without reference to the California Welfare and Institutions Code, any parent who wilfully fails to support his or her child violates California Penal Code section 270 and can be punished by imprisonment in the county jail for up to one year. (See Lyons v. Municipal Court, supra, 75 Cal.App.3d 829, 838-841, 142 Cal.Rptr. 449, 452-454.) Respondent in

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present his claim fairly . . . ." (Ross v. Moffitt, supra, at p. 616 (discussing rights of criminal defendants to counsel in seeking discretionary appeals). Here respondent was in the same position as every other civil litigant.

this case could have been charged with a violation of California Penal Code section 270 whether or not the civil suit for child support had ever been filed. The filing of a suit for child support does not have a significant bearing on any subsequent criminal proceeding which might follow. (Cf. Salas v. Cortez, supra, 24 Cal.3d 22, 28-29.)

It is true that finding a person in civil contempt (Cal.Code Civ. Proc., §§ 1209, 1209.5, 1218) does require the preexistence of a valid court order; nevertheless the concerns expressed in the California Court of Appeal's opinion (Opn. of Cal. Ct. of App., App. B, pp. 80-82.) are answered by the fact that contempt under California Code of Civil Procedure section 1209.5, like California Penal Code section 270, requires a subsequent intervening act,[14] the wilful violation of

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14. Obviously the hazard of possible incarceration is too attenuated to require appointment of counsel in this case as in suits in which an injunction might issue even though the defendant might wilfully

the order by the wilful refusal to pay, and someone who does not have the financial ability to pay in accordance with the order cannot be guilty of

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flaunt the court's judgment at some time in the future. (Cf. Smith v. Superior Court, 110 Cal.App.3d 422, 426 (Right against self-incrimination does not apply in case where an injunction is sought although violation of injunction could lead to imprisonment through contempt).) If the California Court of Appeal is correct in requiring counsel in this case, would it not necessarily follow that appointed counsel are constitutionally required in all divorce or marriage dissolution proceedings since in most jurisdictions, if alimony or child support or child custody is determined and ordered, a contempt proceeding could be filed at some future time if one of the parties wilfully violates the trial court's order?

contempt in California.[15/] (Oliver v. Superior Court, 197 Cal.App.2d 237, 241-242, 17 Cal.Rptr. 474, 476 477. It is improper to assume that defendants will wilfully flaunt support orders of the trial court or will fail to provide such support as they can.

It is clear that neither a civil contempt proceeding nor a criminal prosecution and a sentence to prison is a consequence of the civil judgment taken against respondent. Therefore appointed counsel is not constitutionally required. (Cf. Scott v. Illinois, supra (1979) 440 U.S. 367, 373, 59 L.Ed.2d 383, 388-389, 99 S.Ct. 1158, 1161-1162; See Tetro v.

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15. In California, appointed counsel is available in both civil contempt and Penal Code section 270 proceedings. (See Salas v. Cortez, supra, 24 Cal.3d 22, 27, fn. 2; see In re Liu, 273 Cal.App.2d 135, 141, 78 Cal.Rptr. 85, 90-91; In re Shelley, 197 Cal.App.2d 199, 201, 16 Cal.Rptr. 916, 918; Annot. (1973) 52 A.L.R.3d 1002.)

Tetro (1975) 86 Wash.2d 252, 255, fn. 1, 544 P.2d 17, 20, fn. 1.) The Constitution does not mandate appointment of counsel under the facts of the case at bar, for respondent is an ordinary civil litigant and only money is at issue.

Accordingly, the Petition for Writ of Certiorari should be granted in this case, and on hearing the case, this Honorable Court should reverse the judgment of the California Court of Appeal.

CONCLUSION

This case presents an excellent opportunity to define more clearly the meaning of Lassiter and Little and the constitutional requirements for appointed counsel in civil cases.

Assuming that a stipulation can be considered a confession of judgment, this case can resolve the question which certain courts perceive to have been left open in D.H. Overmyer, whether a prejudgment judicial hearing is constitutionally required.

Petitioner submits that the California Court of Appeal went too far in this case

and that this Court should resolve these issues. If allowed to stand, the holding of this case that stipulated judgments are void will immediately leave thousands of children without any support. Clearly the Fourteenth Amendment does not require appointment of counsel where, as in this case, only money is at issue; and, further, the Fourteenth Amendment does not require a prejudgment hearing before a stipulated judgment can be entered.

For the foregoing reasons, then, it is respectfully requested that a writ of certiorari issue in this to resolve these important issues and that thereafter this Honorable Court reverse the Judgment of the California Court of Appeal.

Respectfully submitted,

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